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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6184

ANTONIO TORRES, DOMINGO MARTINEZ, ALBERTO RODRIGUEZ, IVAN OLIVER, ROSE SEGAL, ARMETRA HERD, LOUIS VELASQUEZ, CARMELO MACHADO, MARGARET HAINES, MARTIN GOLD, RAFAELA GARCIA, BLANCA SOTO, GILL VAZQUEZ, ANA PULIDO, MACEO PULIDO, MILLIE VAN ETTEN, CONNIE TKACS, RAMONA SANCHEZ, LUS MARTINEZ, BEVERLY HALL, and VIOLA ROSCH, individually and on behalf of all others similarly situated,

Petitioners,

against

NEW YORK CITY TRANSIT AUTHORITY; METROPOLITAN TRANSIT AUTHORITY; WILLIAM J. RONAN, individually and as Chairman and Member of NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSIT AUTHORITY; JUSTIN N. FELDMAN, WILLIAM L. BUTCHER, HAROLD L. FISHER, WILLIAM L. SHEA, EBEN W. PYNE, LEONARD BRAUN, LAWRENCE R. BAILEY, DONALD J. ELLIOT, FREDERIC B. POWERS, MORTIMER GLEESON, individually and as members of NYCTA and MTA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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PETITION NOT PRINTED

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents ask this Court to deny petitioners a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered November 15, 1972, which affirmed the dismissal of the complaint by the District Court for the Eastern District of New York.

Opinions Below

No opinion was rendered by the Court of Appeals. The appeal was dismissed in open court, after oral argument. The appeal had similarly been dismissed without opinion on December 8, 1971 and thereafter reinstated by order of the Court dated April 17, 1972. The opinion of the District Court for the Eastern District of New York is unreported. A copy is annexed to petitioners' motion papers as Appendix "A".

Question Presented

Did the fixation by respondents of local transit fares on the Rockaway line of the New York City Transit System in accordance with and as authorized by a state statute, violate petitioners' rights to due process or to equal protection of law where their claim is that the rate of fare is an economic hardship on them as indigent residents of the Rockaway area?

We argue that the courts below were correct in granting summary judgment dismissing the complaint since no substantial federal question is presented by this litigation. Moreover, petitioners have not been denied equal protection. The rate of fare has a rational basis, a long history and is charged alike to all users of the facility. Nor have they been denied due process by respondents' exercise of a duly delegated legislative function in fixing rates of fare on the city-owned transit facilities.

Statement of the Case

The Respondents

The respondent, New York City Transit Authority (hereinafter, the "Transit Authority"), a public benefit corporation, was created in 1953 by the Legislature of New York for the purpose of operating the transit facilities

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owned by the City of New York and leased to the Transit Authority. In carrying out its corporate purposes it is deemed to be performing a governmental function (New York Public Authorities Law, § 1202).

The respondent, Metropolitan Transportation Authority (sued herein as the Metropolitan Transit Authority), also a public benefit corporation, was reorganized, as it now exists, in 1968 by the Legislature of New York to develop a unified mass transportation policy for the district which embraces New York City and several surrounding counties (New York Public Authorities Law, §§ 1263-64). Petitioners seek no relief against this Authority, and, in fact, it has no power to fix fares on the Rockaway line or on any other subway line.

The individually named respondents are the Chairman and the members of the Metropolitan Transportation Authority who are, *ex officio*, also the Chairman and the members of the Transit Authority (New York Public Authorities Law, § 1201, subd. 1).

Since the relief sought by the petitioners is directed solely against the New York City Transit Authority and its members this brief is submitted as though they were the sole respondents.

In creating the Transit Authority, the Legislature expressly delegated to it the function of establishing fares, with the proviso that the rate or rates fixed were to be in such an amount as in the judgment of the Authority would be necessary to maintain operations on a self-sustaining basis. Subsequently, the Legislature defined the term "self-sustaining" as a standard for the guidance of the Transit Authority (New York Public Authorities Law, § 1205, subd. 1, *infra*, p. 7). The transit facilities, both subways and buses, are operated by the Transit Authority solely within the geographical limits of the City of New York. Petitioners challenge the rate of fare on one line, i.e. that serving the Rockaway area of Queens County, within the city limits, and now connected to the subway system.

Facts

History of the Rockaway Line

The Rockaway line was built by a private railroad company and privately operated until 1950, when a fire destroyed some 1800 feet of railroad trestle over Jamaica Bay. The private operator, the Long Island Rail Road, was unwilling to undertake the major investment required to rehabilitate the line, and abandoned it.

The City of New York acquired title to the line in 1953 and repaired it at a cost of some $47,000,000. Operation by the Transit Authority, pursuant to its Agreement of Lease with the City, commenced three years later, in June, 1956.

Initially the Transit Authority determined that the rate of fare to be charged had to be greater on this line than the basic rate of fare charged upon its other rapid transit lines. In fact, as far back as 1933 the Board of Transportation (predecessor to the Transit Authority) had advised the Board of Estimate of the City of New York that, after an extensive study of subway service then being proposed to serve the Rockaway area, it was apparent that a fare triple the then basic fare on other lines would be necessary in view of the anticipated costly operation of the line.

A consideration which lead to this conclusion at that time, and one which has remained equally compelling to the present time, is the physical layout of the line. It involves a long haul over the waters of Jamaica Bay with no intermediate stations. Accordingly, the cost of operating this line is greater since it does not produce the revenue earned by other lines which carry short distance riders. While petitioners stress (petition, p. 10) their charge that the respondents should have reconsidered the fare fixation in the light of alleged changes in population and economic circumstances in the area (neither of which are applicable to fare-fixing), they chose to ignore the basic factor of the geographical location which, of course, has not changed at all.

It was also thought in 1956 that, after five years of operation, the line might become self-sustaining; in fact, the deficit has grown annually. Therefore, the initial fixation of the fare on this line at $.30 per ride increased in 1966, 1970 and in 1972. It should be noted that the last single fare charged by the Long Island Rail Road, as far back as 1953, from Rockaway Park or Far Rockaway to Penn Station in midtown Manhattan was $1.02.

ARGUMENT

No substantial federal question is presented in this litigation and no review is warranted.

a. Petitioners have not been deprived of a constitutionally-protected property right.

Petitioners bring this action for a declaratory judgment and injunctive relief pursuant to 42 U. S. C. § 1983 claiming that the federal courts have jurisdiction pursuant to 28 U. S. C. § 1343(3). Section 1983 authorizes a cause of action against every "person" who, under color of any state law deprives any citizen or other person of "rights, privileges or immunities secured by the Constitution and laws, * * *". Section 1343(3) provides that the district court shall have original jurisdiction of any civil action authorized by law to redress the deprivation, under color of state law, of any rights, privileges or immunities "secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of persons within the jurisdiction of the United States."

Both the District Court and, initially, the Court of Appeals dismissed the complaint for lack of federal jurisdiction on the theory that, assuming a "right" to be here involved, it was a property right and not one of constitutionally protected personal liberty, citing the then controlling holding in *Eisen* v. *Eastman*, 421 F. 2d 560 (2d Cir., 1969) cert. denied, 400 U. S. 841 (1970). Thereafter, when

this Court ruled in *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972) that, for the purpose of conferring jurisdiction under § 1343, there is no distinction between rights of personal liberty and of property, the Court of Appeals vacated its dismissal of the appeal.

On reargument of this appeal we urged that, conceding the principle of the *Lynch* case, these petitioners have no "property right", protected by the Constitution, in a rate of fare on a transportation facility. When a passenger pays a fare he is in no sense deprived of his property; rather, he is paying a fee for a service, a situation akin to any commercial transaction wherein money is exchanged for a commodity or a service.

The petitioners base their claims on the false premise that they have a property right in the rate of fare in their area, and from that unsound foundation argue that procedural due process entitles them to a hearing before there can be any fixation of such fare. But this Court has ruled that not all property rights entitle the one asserting the right to a hearing (*Board of Regents* v. *Roth*, 408 U. S. 564 [1972] and *Perry* v. *Sindermann*, 408 U. S. 593 [1972]). In the *Roth* case this Court discussed distinctions between liberty and property and found that the latter may "take many forms", referring to welfare benefits and public employment where the person had already acquired an interest in specific benefits. The Court found that (p. 577):

> "Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."

Undoubtedly the petitioners, in common with all subway passengers and indeed all consumers in inflationary times, have a need or desire for prices not to advance but they are not guaranteed such result. Since petitioners do not have a

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right entitling them to a specific rate of fare, the fixation of the rates of fare on the subway line, without a hearing, does not deprive them of due process.

Petitioners argue (Section II of their petition) that due process entitles them to an opportunity to participate in what they term the administrative decision-making involved in the fixing of fares. But that is not what is here in question. In fixing fares on the subways, the members of the Transit Authority are performing a legislative function duly delegated to them by the State Legislature. In fact, at one time such fares were fixed directly by the State Legislature (Laws of New York, 1924, ch. 573).

The statutory delegation to the Transit Authority of the power to fix fares without a hearing, the standard on which they shall be fixed and the definition of self-sustaining are to be found in subdivision 1 of New York Public Authorities Law, § 1205 which reads as follows:

> "Notwithstanding the provisions of any other law, the terms of any contract or franchise, the authority shall have the power at all times to fix or adjust the rate or rates of fare to be charged for the use of any transit facility operated by the authority as may in the judgment of the authority be necessary to maintain the operations of the authority on a self-sustaining basis. The operations of the authority shall be deemed to be on a self-sustaining basis, as required by this title, when the authority is able to pay from revenue, from any funds granted or transferred to the authority pursuant to any provision of law, including funds granted pursuant to the provisions of section ninety-eight-b of the general municipal law, and from any other funds actually available to the authority, including the proceeds of borrowings for working capital purposes, the expenses of operation of the authority as the same shall become due."

Furthermore, the courts have held that due process does not require hearings with respect to legislative acts, even where the legislative power has been delegated to an administrative agency.

In *Bowles* v. *Willingham*, 321 U. S. 503 (1944), the constitutionality of federal rent control laws was challenged, among other reasons, for failing to provide a hearing for landlords before an order fixing rents became effective. Mr. Justice DOUGLAS, writing the opinion for this Court and referring to the decision in *Bi-Metallic Investment Co.* v. *Colorado*, 239 U. S. 441 (1915), said (p. 519):

> "Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents on a national basis the same as it did for the District of Columbia. See 55 Stat. 788. We agree with the Emergency Court of Appeals (*Avant* v. *Bowles*, 139 F. 2d 702) that Congress need not make that requirement when it delegates the task to an administrative agency. In *Bi-Metallic Investment Co.* v. *State Board*, 239 U. S. 441, a suit was brought by a taxpayer and landowner to enjoin a Colorado Board from putting in effect an order which increased the valuation of all taxable property in Denver 40 per cent. Such action, it was alleged, violated the Fourteenth Amendment as the plaintiff was given no opportunity to be heard. Mr. Justice Holmes, speaking for the Court, stated, p. 445: 'Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General Statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule'."

The recent decision of this Court in *United States* v. *Florida East Coast Railway Co.* 41 U. S. L. W. 4247, decided January 22, 1973, does not in any way change the prior ruling in the *Bi-Metallic* case, which is still applicable to the facts in this case.

The *Bi-Metallic* case was cited by the New York courts, in a case sustaining the legality of the fixation of subway

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fares, without requiring the holding of a hearing, *Glen* v. *Rockefeller*, 61 Misc. 2d 942, aff'd on opinion below 34 AD 2d 930 (1st Dept., 1970).

Thus, there is neither a statutory nor a constitutional requirement that a hearing be held before the Transit Authority, in the exercise of the legislative function delegated to it, fixes the rate of fare on the facilities under its jurisdiction.

b. The courts below properly granted summary judgment dismissing the complaint.

Petitioners challenge the validity of the lower courts' grant of a summary judgment, urging that they should have been permitted an opportunity to examine the Authority's accounting procedures and financial condition and present their own figures and statistics. In other words, they would set themselves up as experts in transit financing, a self-appointed "watchdog" committee.

The Transit Authority is not free from supervision of its financial affairs by other governmental agencies. First, New York Public Authorities Law § 1208 establishes the methods for keeping our accounts and requires publication of them in a city record, which publication is now called the "Transit Record", published monthly and widely distributed. Sections 2500-2503 of the New York Public Authorities Law prescribe an elaborate system of annual reports and audits to be made and submitted by all public authorities at regular intervals to various elected public officials. Such reports must be submitted to the governor, the chairman of the state senate finance committee, the chairman of the assembly ways and means committee and the state comptroller, within ninety days after the end of the fiscal year. In addition, the Transit Authority must also submit its reports to the mayor, the city comptroller and the board of estimate (New York Public Authorities Law, § 1203). Moreover "budget information", in the form submitted to the members of each authority, must also be submitted an-

nually to the governor, the chairman of the state senate finance committee and the chairman of the assembly ways and means committee (§ 2501); copies of the reports of any external audit or examination of an authority's books and accounts must go to the same officials (§ 2502) and the state comptroller has the right at any time to examine the books and accounts of each authority and must do so at least once every five years (§ 2503).

The members of the Transit Authority who are appointed by the Governor, three on recommendation of the Mayor, are, of course, well aware of economic facts. They are, however, given no choice but to perform their statutory duty. They do not set fares in a vacuum but with full appreciation that their actions will be subject to scrutiny and criticism by many "watchdog" organizations and individuals, public and private.

As a further basis for alleged lack of due process in denying a hearing before fares are fixed, petitioners, although they admit that New York Public Authorities Law, §1205, *supra*, does not contain a requirement of a hearing, point to New York Public Authorities Law, § 1266, subdivision 3 which does require a public hearing. They further concede that this statute is not applicable to the fixation of fares on the Transit Authority's facilities but only to those operated by the Metropolitan Transportation Authority or one of its subsidiaries. Nevertheless they urge that the statutory scheme is unreasonably discriminatory and they mistakenly allege (footnote, p. 14 of their petition) that the legislative fare-setting standards are the same in both sections of the statute.

It should be noted that the transit facilities operated by the Transit Authority are restricted to the geographical limits of the City of New York and include all subways and many bus lines. These limited facilities are required to be "self-sustaining" as the term is defined in the statute. The jurisdiction of the Metropolitan Transportation Authority in operating facilities, through its subsidiaries, is much

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broader, both as to area and type of facility. Bridges, tunnels, airports and commuter railroads, which are located in several counties outside of the City and reach into Connecticut, affect business interests and political entities other than those of New York City residents. The commuter lines run through many small cities and towns, with their own elected representatives and often with competing interests. All of these varied facilities, together, are to be "self-sustaining". Accordingly the two standards are not at all the same and petitioners have not been denied equal protection because a statute, not applicable to them, may afford a hearing to others.

c. Petitioners have not been deprived of any right of personal liberty.

Petitioners argue that the double fare limits their personal liberty in various ways, e. g. by depriving them of access to institutions of higher learning, courts, cultural and recreational facilities, food stamp distribution centers, hospitals, etc. (Petition, p. 4).

In the lower courts petitioners contended that, because of their low economic status and the allegedly inaccessible locations of their homes, they have been seriously affected by the rate of fare on the Rockaway subway line. It is, of course, none of the Transit Authority's doing that these petitioners live where they do. To the extent that those of them receiving welfare payments do not receive sufficient funds to cover their transportation needs, they are seeking relief from the wrong "defendants." As we have demonstrated, the role of the Transit Authority is to operate the city-owned transit facilities, not to dispense welfare grants. It must carry out its mandate to operate on a self-sustaining basis without any right to compel financial assistance or impose taxes to meet obligations. In other words, the Transit Authority is in no sense a social welfare agency.

The Transit Authority must consider the overall costs of operation for all the services it provides and gear its fares

to producing the income necessary to keep going. Accordingly, neither the financial status nor the location of the residences of its passengers can be the determinative factors in the fixation of its fares.

If the fixation of a subway fare is held to limit the personal liberty of the poor, then the same would also be true of any other administrative or legislative act of government that imposed some economic burden on the public in general. Groups wishing to challenge such acts in the federal courts would need only to present their claim through a poor person in order to sustain jurisdiction under the civil rights statutes.

d. Additional grounds for denying certiorari.

Had the petitioners presented valid constitutional questions, there are additional reasons why this Court need not pass upon them.

Since the transit facilities operated by the Transit Authority, a state-created public corporation, are solely within the geographical limits of the City of New York, the rates of fare fixed pursuant to a state statute are of purely local concern. Under the doctrine of abstention the federal courts should not intervene (*Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341 [1951]).

Moreover, the very constitutional and sociological arguments which the petitioners seek to raise have been repeatedly presented to and rejected by the state courts in a long series of cases commencing in 1956 when the Transit Authority began operation of the Rockaway line. The initial fixation of fare on that line was immediately challenged in *Application of Love,* 155 N. Y. S. 2d 266 (Sup. Ct., Kings Co., 1956, not officially reported). The charge was made that the passengers on that line were being denied equal protection of the laws in that they would have to pay double the basic fare charged on other subway lines. In rejecting the argument, the Court held that the power to fix fares was a legislative function, delegated solely to the Transit

Authority and that the circumstances of the costly operation of the line justified a higher fare.

This case has been followed and its findings reiterated in all subsequent state court decisions which have been instituted, sporadically, over the years. One such case is still pending, *Sheldon* v. *New York City Transit Authority*, 39 AD 2d 950 (2nd Dept., 1972) which raises arguments similar to those advanced by the petitioners as to fiscal factors involved in the fixation of fares.

In summary, our position is that if the fare applied equally to all riders on the Rockaway line has been fixed in accordance with the state statute, the fact that persons of low income living in the Rockaways find it burdensome, does not, standing alone, constitute a violation of the civil rights statute. The courts below found that no substantial federal question is presented here. Accordingly, there is no need for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

March 6, 1973

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